No. 11,267

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. C. and AGNES GRAHAM, doing business as Graham Ship Repair Co.,
Respondents.

BRIEF FOR
BAY CITIES METAL TRADES COUNCIL, A. F. OF L.

CHARLES J. JANIGIAN,
CHARLES P. SCULLY,
402 Flood Building, San Francisco 2,
Attorneys for Bay Cities Metal Trades Council, A. F. of L.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 11,267

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. C. and AGNES GRAHAM, doing business as Graham Ship Repair Co.,
Respondents.

BRIEF FOR
BAY CITIES METAL TRADES COUNCIL, A. F. OF L.

STATEMENT OF JURISDICTION.

The petition for enforcement of orders contains appropriate allegations showing that the court has jurisdiction under Section 10 (e) of the National Labor Relations Act. (T 72-73.) The allegations are true. Jurisdiction of this court is therefore plain under said Section 10 (e). (29 U.S.C.A., sec. 160 (e).)

STATEMENT OF THE CASE.

This brief is filed by the Bay Cities Metal Trades Council, A. F. of L., hereinafter to be referred to as the Council. It was party to the contract of January 2, 1945, which the order sought to be enforced has impaired. (T 14.) The complaint issued by the Board on March 3, 1945 (T 3-11) was answered by the Council on March 16, 1945 (T 15-18), and it appeared in the hearing before the Trial Examiner and participated therein (T 88-419). At the conclusion of the hearing it moved to dismiss the complaint. (T 397.)

The Council duly excepted (T 19-21) to the Intermediate Report made by the Trial Examiner on June 8, 1945 (T 33-60). As the exceptions refer to the pages and lines of the Report as filed, correlation with the Report as printed in the Transcript is necessary. The Council excepted (Ex. 1, T 19) to the denial of its motion to dismiss (T 36, L 10-12); it excepted (Ex. II (1), T 19) to the finding that "The Council, however, offered no evidence in support of its contention" (T 38, L 23-25); it excepted (Ex. II (2), (3), (4), T 19-20) to the findings commencing with the words "In a matter" (T 40, L 5) and ending with the words "conditions of employment" (T 44, L 9); it excepted (Ex. II (5), T 20) to the findings commencing with the words "The respondents" (T 45, L 6-7) and ending with the words "Industrial Organization" (T 45, L 14), and (Ex. II (6), T 20) all of footnote 6 (T 45-46); it excepted (Ex. II (7), T 20) to the findings that "On the latter date, Lehaney and Graham instructed

Close to request Smith to prepare a contract covering the machinists" (T 47, L 2-4); it excepted (Ex. II (8), (9), (10), (11), T 20) to the findings commencing with the words "It is clear" (T 47, L 28) and ending with the words "Section 7 of the Act (T 50, L 16); it excepted (Ex. II (12), (13), (14), (15), (16), T 21) to the findings commencing with the words "At the end" (T 50, L 26) and ending with the words "during such period" (T 54, L 2); it excepted (Ex. II (17), T 21) to all the conclusions of law except conclusion No. 1 (T 54, L 7-12); and it excepted (Ex. II (18), T 21) to all the "Recommendations" of the Trial Examiner (T 56-60). A brief supporting the exceptions was filed with the Board. (T 22.) The Council participated in the oral argument before the Board on August 14, 1945 (T 22-23), and following the Board's decision and order on September 12, 1945 (T 22-30), it petitioned for a rehearing (T 63-68) which was denied (T 68-71). The Council answered the petition herein for enforcement of the order. (T 421-425.)

In stating the facts, the Council will be mindful of what this court said in *N. L. R. B. v. J. G. Boswell Co.,* 9 Cir. 1943, 136 F2d 585, at pages 589 and 590:

> "All that the Act requires to sustain the Board's findings is that they be supported by substantial evidence. Our Rule 20 simplifies the presentation of the respondents' case, both for the respondents and the court. If the Board's statement of fact is not sufficient to sustain the findings, the respondents' brief, in effect, may demur to it. If suffi-

cient, it may be attacked by showing that the portions of the record referred to do not support the Board's statement."

And the Council will also be mindful of what this court said in *N. L. R. B. v. Grower-Shipper Veg. Assn.*, 9 Cir. 1941, 122 F2d 368, at page 375 and 376:

> "Findings of the Board are conclusive only when supported by 'substantial evidence' which means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. Edison Co. v. Labor Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126. Evidence which is unsubstantial in a jury case or court, does not become substantial merely because it is before the Board, for the evidence required to support the Board's findings 'must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' Labor Board v. Columbian Co., 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660. 'Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room for doubt what the fact is, the court should give a peremptory instruction to the jury.' Gunning v. Cooley, 281 U.S. 90, 94, 50 S.Ct. 231, 233, 74 L.Ed. 720.
>
> Here we think the evidence so overwhelmingly to the effect that respondents did not refuse to bargain, as to leave no room to doubt that fact, and that a reasonable mind would not accept the evidence of the mere fact of submitting a proposal as adequate to support a conclusion that respondents refused to bargain."

The Bay Cities Metal Trades Council, A. F. of L., has been continuously in existence since 1900 or 1901. (T 263.) In matters of collective bargaining it acts on behalf of affiliated unions whose members are engaged in the metal industry in the area of San Francisco Bay and its tributaries. (T 263-264.) Its secretary was A. T. Wynn and his assistant was Thomas A. Rotell. (T 238, 262.) Local 284 of the International Association of Machinists is one of the 26 local unions affiliated with the Council. (T 300, 315, 330.)

On January 2, 1945, the Council entered into a closed-shop contract with respondents doing business as Graham Ship Repair Co. (T 252, 361.) In the charges upon which the Board issued the complaint it was alleged that the contract was made on January 25, 1945 (T 1, 13), and in the complaint it was alleged that the contract was made on January 13, 1945 (T 6). The findings approved by the Board and its order thereon leave no doubt that the contract was made on January 2, 1945. (T 23-28.)

The contract of January 2, 1945, was made by respondents through their agent Raymond H. Lehaney. (T 238.) They had employed him as Public Relations Manager for the Graham Ship Repair Company. (T 121, 258, 259, 353.) His experience in labor relations was wide. (T 121.) He was also Public Relations Director for the Western Congress of the International Brotherhood of Teamsters, Warehousemen, Chauffeurs and Helpers of America, AFL. (T 121-123, 352.) His authority to make the contract was

plenary and plenarily exercised. (T 131, 239, 259, 261, 276, 315, 350, 358, 378.) Petitioner does not assert the contrary.

The ship yard leased by respondents began operating on January 1, 1945. (T 118, 119.) Petitioner is in error in stating in its brief (p. 5) that respondents did not begin operating until January 3, 1945. No obligations of their predecessor or predecessors were assumed by respondents. (T 25.) Respondents had previously operated in the East under a closed-shop AFL agreement. (T 125.) When they began operating in the West with a Labor Relations Manager aligned with the AFL, it is reasonable to suppose that they again contemplated operating under a closed-shop AFL agreement. The record is inevitable in its conclusion that the contract signed by their Labor Relations Manager on January 2, 1945, was of that character. Before the contract was signed he was told by officers of the Council that it was under no duty to supply man power of any kind to the respondents and would only do so if the respondents agreed to a closed-shop AFL agreement for all the crafts affiliated with the Council including machinists. (T 259, 261, 266.) This was confirmed by Lehaney the Labor Relations Manager. (T 358.) And after the contract of January 2, 1945, was signed both Lehaney and the Council insisted that the agreement they had made extended to all crafts and included machinists. (T 272, 275, 276, 277, 294, 360, 363.)

On January 2, 1945, the day the contract was signed and the day after operations began, the respondents

had 8 employees at the yard none of whom was a machinist. (T 194, 345.) The expansion in employees was rapid. For the week ending January 7, 1945, the employees numbered 50; for the week ending January 14, 1945, they numbered 133; for the week ending January 21, 1945, they numbered 181; and for the week ending January 28, 1945, they numbered 309; and for the week ending February 2, 1945, they numbered 412. (T 139.) The expansion in machinists was also marked. It commenced with 3 on January 3, 1945, and had increased to 14 by January 25, 1945. (T 345.) A count of machinists at the yard on January 25, 1945, disclosed 32 or 33 machinists, 14 of whom were CIO machinists and the balance AFL machinists. (T 367.)

The record makes it apparent that the labor troubles over machinists at the ship yard of the respondents was the result of clashing viewpoints on the part of their executives. (T 363-364, 378.) But contrary to the findings of the Trial Examiner (T 50-51) and the assertions in the brief for petitioner (p. 7) to the effect that respondents discharged the CIO machinists, the record establishes that respondents did not discharge them (T 132, 138). This is conceded in the decision and order of the Board. (T 26-27.)

The vital findings made by the Trial Examiner and adopted by the Board (T 23) were (1) that the respondents did not intend to have the machinists covered by the closed-shop contract of January 2, 1945, and (2) that on and after January 2, 1945, the CIO union represented a majority in an appropriate union

of machinists. In its decision and order the Board added (3) that in any event a unit of production and maintenance employees, including machinists, would be inappropriate. (T. 23-24.)

The Council's arguments will be presented under the following headings:

1. The finding that the respondents did not intend to have the machinists covered by the closed-shop contract of January 2, 1945, is not supported by substantial evidence.

2. The finding that a unit of production and maintenance employees, including machinists, would be inappropriate, is not supported by substantial evidence.

3. The finding that on and after January 2, 1945, the CIO union represented a majority in an appropriate unit of machinists, is not supported by substantial evidence.

---

1. THE FINDING THAT THE RESPONDENTS DID NOT INTEND TO HAVE THE MACHINISTS COVERED BY THE CLOSED-SHOP CONTRACT OF JANUARY 2, 1945, IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

It may not be doubted that when the Labor Relations Manager of the respondents came to the Council late in December 1944 (T 354) and announced the intention of his employers to open a ship yard on January 1, 1945, the Council was not obligated, contractually or otherwise, to furnish the respondents with man power. Nor may it be doubted that the CIO did not have trade union territorial sovereignty

in the San Francisco Bay area over man power represented by machinists employed or to be employed in ship yards. The Council was asked by the Labor Relations Manager to state the terms upon which it would supply the respondents man power. It stated those terms and told him that it would require a closed-shop AFL agreement for all the crafts affiliated with the Council including machinists. Those terms were accepted by the Labor Relations Manager on behalf of the respondents, and the contract of January 2, 1945, was made to carry out those terms. His authority was plenary and plenarily exercised. His testimony is unequivocal that such was the intention of the contract. Unequivocally to the same effect is the testimony of those participating in the making of the contract on behalf of the Council. On the record, therefore, the evidence upon the issue is so overwhelmingly on one side as to leave no room for doubt that the fact is that respondents through their agent, the Labor Relations Manager, and the Council, through its officers, did intend to have the machinists covered by the closed-shop contract of January 2, 1945.

Viewing the record in the light most favorable to the petitioner on the issue, all that can be said is that other executives of the respondents or perhaps the respondents personally might have made a contract narrower in scope, and that reasons of expediency might have prompted a narrowing process. But the proper function of the Board was to consider the contract as made by those actually and actively

participating in its making rather than as it might have been made by others who did not actually and actively participate in its making. On the record, therefore, there is no substantial evidence to support the finding here challenged.

---

2. THE FINDING THAT A UNIT OF PRODUCTION AND MAINTENANCE EMPLOYEES, INCLUDING MACHINISTS, WOULD BE INAPPROPRIATE, IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Upon a review of the Intermediate Report of the Trial Examiner, the Board apparently became doubtful that the evidence was sufficient to support the finding discussed in the preceding subdivision and it thereupon added the finding now under discussion. (T 23-24.)

The Council appreciates, of course, that the Board has a wide discretion in determining whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof". (29 U.S.C.A., sec. 159 (b).) That discretion is abused, however, if the determination be arbitrary or capricious. (*N. L. R. B. v. Sunshine Mining Co.*, 9 Cir. 1940, 110 F. 2d 780, 789; *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 6 Cir. 1945, 146 F. 2d 718, 720.) A manifest abuse of discretion is here reflected.

The Board will not deny that machinists are properly classified as maintenance and production employees. Nor will the Board deny that on repeated

occasions it has determined that a unit of production and maintenance employees is appropriate. *Timm Aircraft Co.,* 1943, 48 N.L.R.B. 503, is illustrative. Therefore in the present case it cannot be said that it was inherently inappropriate for the parties to the contract of January 2, 1945, to create a unit which included machinists along with other production and maintenance employees all affiliated with the AFL. That the parties to the contract of January 2, 1945, intended to create a unit of that character, has already been demonstrated. Why, then, should it be held that the unit was inappropriate? The Board was apparently motivated to this holding by the assumption that when the AFL contract of January 2, 1945, was made, a unit of CIO machinists was already functioning at the ship yard of the respondents, and by the fact that in other ship yards in the area CIO machinists were recognized as a separate and appropriate unit.

The Board's assumption was erroneous. According to the record the AFL closed-shop contract of January 2, 1945, was made the day before any CIO machinists were employed by respondents. What is plain, moreover, is that they were employed in violation of the contract which obligated the respondents to employ AFL machinists. In essence, therefore, the Board has held that CIO machinists employed in violation of a closed-shop AFL contract, assume the dignity of an appropriate unit which defeats or destroys the AFL contract and renders inappropriate the unit thereby created and which would have been appro-

priate but for the violation of the contract. That the determination is arbitrary, capricious, and an abuse of discretion, is obvious.

The fact that in other ship yards in the area CIO machinists were recognized as a separate and appropriate unit, is not controlling. Such units neither existed nor persisted in violation of closed-shop contracts. Their recognition therefore served to promote the national welfare. The situation here is different. Certainly it must here be said that the national welfare was not promoted by the action of the Board in encouraging and approving the violation of the closed-shop contract of January 2, 1945, and setting up in a ship yard during a time of national peril a small and separate unit for a rival union when the contract stipulated the contrary. Surely under such circumstances the national welfare could only be promoted by enforcing the contract and deeming as the appropriate unit the one which would eliminate jurisdictional disputes between rival unions during a time of national peril. The determination of the Board, it is repeated, is arbitrary, capricious, and an abuse of discretion.

---

3. THE FINDING THAT ON AND AFTER JANUARY 2, 1945, THE CIO UNION REPRESENTED A MAJORITY IN AN APPROPRIATE UNIT OF MACHINISTS, IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In earlier parts of this brief it has been demonstrated that no machinists were employed by the respondents until after January 2, 1945. The finding

to the contrary is therefore unsupported by the evidence. What was said in the preceding subdivision has equal application here. It was there demonstrated that the unit of production and maintenance employees, including machinists, would be appropriate. This would destroy the finding that the CIO machinists constituted an appropriate unit. And the preceding subdivision made it clear that the national welfare during a time of national peril was not promoted by the actions of the Board in designating the CIO machinists as an appropriate unit. It was held in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 6 Cir. 1945, 146 F. 2d 718, 722, that in time of national peril "the preservation, protection and promotion of the national welfare is the paramount objective", and that an order designating an "appropriate unit" will not be enforced in the absence of a finding that such unit was "selected in deference to the imperative public interests". No finding of that character was here made. The conclusion is therefore confirmed that the determination was arbitrary, capricious, and an abuse of discretion.

Finally, the case calls for an application of the doctrine of "expanding unit" to which the Board is committed. (*Solar Aircraft Company*, 1943, 48 N. L. R. B. 242.) This doctrine is to the effect that no exclusive recognition may be accorded to a union representing an "expanding unit" and that an employer may not enter into a collective bargaining agreement with a union representing a majority of the employees in such "expanding unit" until the unit represents

50% or more of a normal complement of the number which an employer contemplates hiring.

It is very apparent from all the evidence in this case that the employer intended to, and did, hire a great many more machinists than three. Reference has been earlier made to evidence showing the expanding number of machinists between January 3, 1945, and January 25, 1945, and disclosing that a count of machinists at the ship yard on January 25, 1945, showed 32 or 33 machinists of which 14 were CIO and the balance AFL. In holding that the three CIO machinists employed on January 3, 1945, constituted an "appropriate unit" the Board did violence to its doctrine of "expanding unit". And under that doctrine the finding that the CIO machinists constituted an "appropriate unit" is destroyed.

CONCLUSION.

The Council therefore respectfully submits that the petition to enforce the order should be denied.

Dated, San Francisco,
October 18, 1946.

CHARLES J. JANIGIAN,
CHARLES P. SCULLY,
By CHARLES P. SCULLY,
Attorneys for Bay Cities Metal Trades Council, A. F. of L.